

Internal Revenue Service
memorandum

CC:TL-N-9806-89

Br4:JTChalhoub

date:

SEP 21 1989

to:

District Counsel, Houston SW:HOU

Attn: Norman N. Pickett, ADC

from:

Assistant Chief Counsel (Tax Litigation) CC:TL

subject:

Overstated Withholding Credits; [REDACTED]
[REDACTED] v. Commissioner, T.C. Docket No. [REDACTED]

This is in response to your request for litigation advice regarding the appropriate method to recapture overstated withholding credits and the period of limitations within which such credits may be recaptured. Although your request discusses a Tax Court stipulated decision in the [REDACTED] case, T.C. Docket No. [REDACTED], a decision which is now final, you have been asked by the Austin Service Center to provide guidance for the future administrative handling of similar problems.

ISSUES

1. Must an overstated withholding credit, that has been refunded, be recaptured by assessment as a mathematical or clerical error under I.R.C. § 6201(a)(3).
2. If such overstated credit is treated as a math error, and excluded from the deficiency procedures by I.R.C. § 6211(b)(1), must such credit be recaptured by assessment within the three-year period of limitations prescribed under I.R.C. § 6501(a).
3. If such overstated credit is an erroneous refund, is the period of limitations for recapture under I.R.C. §§ 7405 and 6532(b) only two years (absent fraud or material misrepresentation of fact).
4. If such an overstated credit is recoverable either within the two-year (or three-year) period, at the election of the Service, may the Service nonetheless send the taxpayer a bill after the three-year period or set-off a credit under I.R.C. §§ 6401(b)(1) and 6402(a) up to the amount of tax reported on the return or up to the amount previously assessed.
5. Does suspension of the statute of limitations on assessment (I.R.C. § 6503(a)(1)) with respect to any deficiency that has been timely petitioned to the Tax Court also suspend the statute of limitations on collection of any amounts not subject to deficiency procedures, e.g., an overstated withholding credit reported on the original return and refunded to the taxpayer.

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CONCLUSIONS

1. thru 4. An overstated withholding credit that has been refunded is a non-rebate erroneous refund and G.C.M.'s 36263 and 36624, Legality of Overpayment Offsets to Collect Unassessable Erroneous Refunds, I-3788-74 and I-330-74 (May 9, 1975) and (March 11, 1976), respectively, state Service position on your questions. A copy of each G.C.M. is attached and explains Service position in detail. The maximum period within which an overstated withholding credit may be collected is six years from the date of assessment, generally April 15, the due date for the income tax return that has been filed. If the Service elects to recapture an excess withholding credit by assessment as a mathematical error, such assessment must be made within three years from the due date of the return and such assessment may exceed the amount of tax reported on the return (or as previously assessed). If such an overstated credit is not discovered until after the three-year statute has expired, or, if discovered, not assessed until after such time, the Service may only recapture an excess credit up to the amount of tax reported on the return or as previously assessed for that year.

5. I.R.C. § 6503(a)(1) only suspends the statute of limitations on assessment and collection with respect to amounts that are deficiencies within the meaning of I.R.C. § 6211. Since withholding credits are specifically excluded by statute from the definition of a deficiency, the suspension does not apply to any such credit.

The Tax Court does not have jurisdiction with respect to an overstated withholding credit because such credit is an Employment Tax under Subtitle C, Chapter 24A, not subject to deficiency procedures. Purdy v. Commissioner, T.C. Memo. 1982-652, and Chatterji v. Commissioner, 54 T.C. 1402 (1970). See Enochs v. Green, 270 F.2d 558, 560-561 (5th Cir. 1959) and Shaw v. United States, 331 F.2d 493, 494-495 (9th Cir. 1964). But see Naftel v. Commissioner, 85 T.C. 527 (1985) and Terry v. Commissioner, 91 T.C. 85 (1988).